Calendar No. 405

89TH CONGRESS
1st Session

SENATE

REPORT
No. 420

EXEMPTION OF COOPERATIVES FROM FEDERAL POWER COMMISSION JURISDICTION

JULY 1, 1965.—Ordered to be printed
Reported, under authority of the order of the Senate of July 1, 1965

Mr. MONRONEY, from the Committee on Commerce, submitted the following

REPORT

[To accompany S. 1459]

The Committee on Commerce, to whom was referred the bill (S. 1459) to amend the Federal Power Act, as amended, in respect of the jurisdiction of the Federal Power Commission over nonprofit cooperatives, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

PURPOSE OF THE LEGISLATION

S. 1459, as amended, would amend the Federal Power Act by adding "any cooperative or nonprofit membership organization which is financed by the Rural Electrification Administration" to the list of organizations expressly exempted from the regulatory jurisdiction of the Federal Power Commission.

BACKGROUND OF THE LEGISLATION

For almost three decades, Congress, the public, the rural electric cooperatives, and successive Federal Power Commissions have assumed that cooperatives were beyond the regulatory reach of the FPC. Yet, on July 22, 1963, the Commission ordered several nonprofit cooperatives, financed in whole or in part by Rural Electrification Administration loans, to demonstrate why they should not be subject to the regulatory jurisdiction of the Power Commission.

The Commission at first persisted in that proceeding despite the wishes of the Senate Appropriations Committee, expressed in both the 1964 and 1965 independent offices appropriations reports, that "no funds be spent by the FPC to establish regulatory authority over REA cooperatives until the Congress (has) had an opportunity to

50-010

consider pending legislation clarifying the intent of Congress on this subject." However, on August 6, 1964, the Commission deferred further proceeding until January 1, 1966, to permit further congressional consideration. The cooperatives subject to this proceeding testified that the cost of responding to the Commission order has been substantial and onerous.

In response to the FPC action, S.1459 was introduced to clarify the intent of Congress to exempt cooperatives from Commission jurisdiction.

As a result of 3 days of hearings, the committee believes that Congress never intended to subject cooperatives to FPC jurisdiction. Moreover, the committee sought, but heard no evidence of any abuse committed by cooperatives which might justify the imposition of regulatory sanctions.

On the contrary, it was shown that cooperatives are subject to a high degree of self-regulation by their member-consumers, buttressed by the controls exercised by the Rural Electrification Administration of the U.S. Department of Agriculture through its contracts and security instruments. The committee concludes, therefore, that the exemption from Federal Power Commission jurisdiction granted by S. 1459, as amended, to cooperatives or nonprofit membership organizations which are financed by the Rural Electrification Administration is wholly warranted by factual circumstances and constitutes an appropriate reaffirmation of congressional intent.

AMENDMENTS

The committee recommends the adoption of the following amendments:

On page 1, amend the title so as to read:

> A bill to amend the Federal Power Act, as amended, in respect of the jurisdiction of the Federal Power Commission over cooperatives financed by the Rural Electrification Administration.

On page 1, line 10 and page 2, line 1, delete "any nonprofit cooperative engaged in rural electrification."

On page 2, line 4, following the word "foregoing" add "or any cooperative or nonprofit membership organization which is financed by the Rural Electrification Administration."

COST

Enactment of the bill would involve no cost to the Federal Government.

AGENCY COMMENTS

The following communications were received from interested Government agencies and were considered by the committee:

DEPARTMENT OF AGRICULTURE,
Washington, D.C., April 22, 1965.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of March 10, 1965, for a report on S. 1459, a bill to amend the Federal Power Act, as amended, in respect of the jurisdiction of the Federal Power Commission over nonprofit cooperatives.

S. 1459 amends subsection (f) of section 201 of the Federal Power Act, which now provides that part II (dealing with the regulation of electric utilities engaged in interstate commerce) shall not be applicable to "the United States, a State or any political subdivision of a State, or any agency, authority, instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing" by including in the above listing of exemptions "any nonprofit cooperative engaged in rural electrification."

This Department recommends that the bill be passed.

Enactment of S. 1459 will fix in the law the situation that has prevailed and been followed by the Federal Power Commission with regard to the operations of REA-financed electric cooperatives since the enactment of the Rural Electrification Act of 1936. Except for a very few occasions, involving transactions with power companies already under FPC jurisdiction, REA-financed cooperative borrowers have functioned outside of FPC jurisdiction. Until recently, FPC has not asserted or attempted to claim such jurisdiction.

On July 22, 1963, the Commission initiated a test case involving three REA-financed electric cooperative organizations (FPC docket No. E–7113), the purpose of which is to determine whether it has jurisdiction over electric cooperatives. Opposing assumption of such jurisdiction, the Secretary of Agriculture, a committee of rural electric cooperatives, various statewide associations of electric cooperatives, and a large number of individual rural electric cooperatives intervened in this proceeding. Lengthy hearings, in which these intervenors participated, were held and completed before the examiner to whom this matter was assigned. However, on August 6, 1964, in compliance with a directive by the Senate Appropriations Committee in its Report No. 1269, dated July 30, 1964, on H.R. 11296, the independent offices appropriation bill, 1965, the Commission ordered the examiner to defer his decision until January 1, 1966, to permit further congressional consideration of the matter. In this connection, it should be noted that the Senate Committee on Commerce completed its hearings on S. 2028, 88th Congress, a bill substantially identical with S. 1459, on July 29, 1964, and on August 10, 1964, reported S. 2028 favorably with amendments (S. Rept. 1363) including an amendment limiting the proposed exemption to cooperatives to those, "engaged in rural electrification," as is provided in S. 1459. Although the position and views of this Department on this subject were fully presented to your committee, we welcome this opportunity to state our support of S. 1459 and to restate the basis for our position.

The Federal Power Commission proceedings represented the culmination of a number of preliminary moves undertaken by FPC looking toward assertion of jurisdiction over rural electric cooperatives. In

this connection, in March 1963, at the invitation of the Federal Power Commission, this Department submitted a comprehensive brief prepared by its Office of General Counsel supporting the position that REA-financed electric cooperatives are not subject to FPC jurisdiction. This position was also held in a letter of February 14, 1963, to FPC Chairman Swidler from REA Administrator Clapp, and in the Secretary of Agriculture's petition for leave to intervene.

While it is recognized that FPC has certain responsibilities imposed by law, the Rural Electrification Act confers upon the Administrator broad responsibilities, not only with respect to protection of the Government's security and financial interest as lender of funds, but also with respect to the achievement of the program objectives of rural electrification set forth in the act. Sound administrative practice dictates that the responsibilities of the respective agencies, contained in statutes enacted close to each other in point of time, should be exercised in such manner as to exclude conflict and to promote most effectively the respective statutory purposes. There is no evidence that Congress intended to divide responsibility between REA and the Commission in the making of loans under the Rural Electrification Act. Besides the ineffective administration which would result from having two Federal agencies passing on whether or not a loan was feasible, such fragmentation of authority is inconsistent with the nature of the REA program and the expressions of its sponsors in the Congress. Section 4 of the Rural Electrification Act contains a proviso that for generating plant loans the consent of State commissions having jurisdiction under State law be obtained. It would seem that if Congress intended the Federal Power Commission to enter into the REA program functioning, it would have expressly so provided.

The nature of the electric cooperative program and REA's administration of its responsibilities and authorities indicate there is no need for FPC jurisdiction over REA-financed cooperatives. Need for Commission regulation to assure acceptable standards of service and reasonable rates to the users of service is absent when the users of the service own and control the supply facilities. Need for Commission regulation to protect the investing public against unsound financing disappears when the lender of substantially all of the funds is the United States itself.

Several attempts have been made to have the Congress enact legislation expressly to provide FPC with jurisdiction over the electric cooperatives in various respects. The Congress has consistently in the past refused to enact such legislation.

Should jurisdiction over REA-financed electric cooperatives by FPC come about, it would subject them to all the financial burdens and time consuming procedures involved in the regulatory process and would provide an additional forum and opportunity for obstruction of this most important and worthwhile program by adverse interests. The resultant delays and increased costs would in the end have to be borne by rural electric consumers.

Enactment of S. 1459 would clarify the present situation by specifically excluding nonprofit cooperatives from the regulatory provisions of the Federal Power Act. Early action on this legislation would remove a potentially heavy burden from the rural electric cooperatives and permit them to devote their time and energies to their task of making adequate supplies of low-cost dependable power available in the rural areas of the United States.

Since the suspension of the Federal Power Commission proceeding terminates on January 1, 1966, we urge enactment of S. 1459 by the Congress prior to that date.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

FEDERAL POWER COMMISSION REPORT ON S. 1459, 89TH CONGRESS

S. 1459 would amend section 201(f) of the Federal Power Act to make the provisions of part II of that act inapplicable to "any nonprofit cooperative engaged in rural electrification." The apparent purpose of the proposal is to insure that such a cooperative shall not be subject to the regulatory jurisdiction of the Commission even if it otherwise would qualify as a "public utility" within the meaning of section 201(e) of the act by reason of the ownership or operation of facilities for the transmission or sale for resale of electric energy in interstate commerce. The bill would also make many of the provisions of part III of the act inapplicable to such entities if they were not licensees under part I.

In a number of uncontested cases decided in recent years, the Commission has held that specified REA cooperatives were public utilities; but, in view of contentions that these determinations reflected an erroneous view of the law, the Commission on July 22, 1963, in docket No. E–7113, undertook a general reconsideration of the matter on the basis of a full evidentiary record and in a framework which would have assured to the cooperative respondents the right to secure judicial review of any adverse determinations.

The proceeding to clarify the question of our jurisdiction over REA cooperatives was part of a comprehensive program instituted by the Commission to define and give effective and vigorous enforcement to the Federal Power Act, a program applicable alike to private investor-owned companies, cooperatives, and other private business entities believed to possess public utility status. Inherent in the fair and impartial administration of such a program was the initial obligation of the Commission to determine which companies are subject to some or all of the regulatory provisions of the Federal Power Act.

The hearing in the proceeding to clarify our jurisdiction over cooperatives has now been completed and all briefs have been filed. By order of the Commission issued August 6, 1964, a copy of which is attached, the examiner has been directed to defer issuing his initial decision until January 1, 1966, for the express purpose of permitting further congressional consideration of the matter. While the proceeding is pending, the Commission has refrained from taking any action to assert jurisdiction over cooperatives and has refrained from listing any cooperative in its published list of electric power suppliers with annual operating revenues of $2,500,000 or more classified as public utilities under the Federal Power Act.[1]

In view of the pending proceeding we are not in a position to express any opinion as to whether "nonprofit cooperatives engaged in

[1] "List of Electric Power Suppliers With Annual Operating Revenues of $2,500,000 or More Classified as Public Utilities Under the Federal Power Act, as of January 1963." The list was issued July 1, 1963.

rural electrification," or those cooperatives which are in a borrower status relative to REA, are subject to some or all of the present provisions of part II of the Federal Power Act.

It is, of course, not necessary that we express our views on the reach of the existing statute in order to comment on this bill. We recognize that S. 1459 poses a different question; namely, whether cooperatives should be subject to FPC regulation irrespective of whether they are now subject to such jurisdiction.

While we believe that the broad exemption legislation which has been proposed is not in the public interest, we are of the opinion that clarifying legislation would be desirable at this time respecting two matters. We have therefore prepared a draft bill to carry out our suggestions which we offer for the committee's consideration.

The first item in our bill concerns section 204 of the Power Act which requires this Commission to pass upon the issuance of certain securities by public utilities. The Commission's General Counsel has advised us that the Commission does not have responsibility under existing law to pass upon or approve REA loans to cooperatives or other electric companies, even if such borrowers are otherwise subject to the Commission's jurisdiction. The Commission has not yet decided this issue but whatever the existing law may be we do not believe any useful purpose would be served by Commission review of the securities issued to another Federal agency and that the delay inherent in such review could be detrimental to the borrowers. Such jurisdiction would in effect constitute a review of the loan decisions of the REA Administrator. We therefore favor amendment of section 204 to eliminate any doubt on that score. The amendment should exempt all REA loans.

Our second proposal concerns the jurisdictional status of those cooperatives which are engaged exclusively in retail distribution. We understand that some 90 percent of the cooperatives fall into this category. The Federal Power Commission's rate jurisdiction, which is confined to sales at wholesale, plainly does not reach their sales to retail consumers. We have not decided in any contested case whether cooperatives which do not generate power or sell power at wholesale or wheel power for others, might be subject to the Federal Power Act because they own facilities for the transmission of power in interstate commerce. Many rural cooperatives own lines of relatively high voltage which are used solely to carry power from their suppliers to the locations in which it is transformed down to the distribution voltages. Since rural electric cooperatives generally serve large and dispersed areas, they may frequently find it economical or even essential to utilize such higher voltage transmission lines as an incident to their local distribution service. We express no opinion as to whether the ownership of such interstate lines would bring a cooperative within the jurisdiction of the Commission under the present statute or whether these facilities can properly be classified as "local distribution facilities" which are exempt under the existing statute. Whatever the existing law may be, however, we believe that there is no need of Federal regulation for such strictly distribution cooperatives. Accordingly, we suggest that section 201(f) of the Power Act be amended to exempt distribution cooperatives. "Distribution cooperatives" would not include co-ops which wheel energy for others or sell energy for resale.

We believe there is a substantial difference between the numerous small cooperatives engaged only in retail operations and the relatively few but individually large and increasingly important group of interstate cooperatives which generate and transmit power and sell it at wholesale to others. The latter, the so-called G. & T. cooperatives, serve investor-owned and municipal electric systems, as well as distribution cooperatives. Their operations bring them into interstate power pools and interchanges. We do not believe that it has been demonstrated that Federal law should not provide for Commission regulation of such operations or that Commission regulation would retard the program of the REA. Accordingly, we do not believe that legislation is warranted with respect to G. & T. cooperatives, except to make clear that the REA loans to such entities are not subject to Commission jurisdiction. We urge that the Congress not enact legislation affecting the general status of such G. & T. cooperatives, at least until the issues can be considered in light of an authoritative construction of the present statute as it may apply to their operations.

Attached hereto is a brief "Analysis of Language of S. 1459" which indicates some problems of interpretation of the present language of the bill in the event that Congress should wish to proceed to consider a general exemption.

The Commission urges enactment of our proposed substitute for S. 1459, which is attached.

FEDERAL POWER COMMISSION,
By JOSEPH C. SWIDLER, *Chairman.*

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and David S. Black.

Docket No. E–7113

DAIRYLAND POWER COOPERATIVE, MINNKOTA POWER COOPERATIVE, INC., SOUTH CENTRAL RURAL ELECTRIC COOPERATIVE, INC.

ORDER DEFERRING FURTHER PROCEEDINGS

(Issued August 6, 1964)

This proceeding was instituted by the Commission on July 22, 1963, to determine whether it had jurisdiction under the Federal Power Act over electric companies organized in the cooperative form and financed by loans from the Rural Electrification Administration, which owned or operated facilities for the interstate transmission or sale at wholesale of electric power. The hearings have been completed and all briefs are in, but the examiner has not yet issued his initial decision.

On July 31, 1964, the Senate Appropriations Committee issued its report on the "Independent Offices Appropriations, 1965." The committee refers (p. 8) to the fact that hearings have recently been held on a bill to clarify congressional intent with respect to the matters in issue in this proceeding, and indicates that while the bill is now pending before the Senate Commerce Committee for consideration,

it may not be possible to complete action thereon this calendar year. Stating the Appropriations Committee's belief that "the assertion of additional Federal regulatory authority over REA cooperatives by the FPC should await the decision of the Congress on pending legislation," the committee expresses its intent that the Commission defer action in the present proceeding until the Congress can give additional attention to the jurisdictional question involved.

In the light of the foregoing, the Commission has concluded that its proceedings in the instant case should be deferred to permit further congressional consideration of the matter. Accordingly, the examiner is directed to defer issuing his initial decision herein until January 1, 1966.

By the Commission:

[SEAL]

GORDON M. GRANT,
Acting Secretary.

SUBSTITUTE FOR S. 1459 PROPOSED BY FEDERAL POWER COMMISSION

(Proposed new language italic; deletions stricken through.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Federal Power Act Amendment of 1965.

SEC. 2. Subsection (f) of section 201 of the Federal Power Act,as amended, is hereby amended to read as follows:

"(f) No provision in this part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, ~~any nonprofit cooperative engaged in rural electrification,~~ or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, *or any distribution cooperative,* or any officer, agent, or employee of any of the foregoing, acting as such in the course of his official duty, unless such provision makes specific reference thereto."

SEC. 3. A new subsection (g) is hereby added to section 201 of the Federal Power Act, as amended, to read as follows:

"(g) The term 'distribution cooperative' when used in this Part means any cooperative organization which does not engage in the transmission of electric energy for another or in the sale of electric energy at wholesale."

SEC. 4. A new subsection (i) is hereby added to section 204 of the Federal Power Act, as amended, to read as follows:

"(i) The provisions of this section shall not apply to loans by the Rural Electrification Administration or any successor agency, nor shall it apply to the undertaking of indebtedness on such loans."

ANALYSIS OF LANGUAGE OF S. 1459

1. The term "nonprofit" can have several meanings. The concept of "profit" arises also in another existing provision of the Federal Power Act, section 10(e), which relates to reasonable annual charges

to be paid by a water power licensee to the United States. In that context "profit" has been held to exist in any individual year in which revenues exceed operating costs. *Power Authority of the State of New York* v. *Federal Power Commission,* 339 F. 2d 269 (CA2 1964); *Central Nebraska Public Power & Irrigation District* v. *Federal Power Commission,* 160 F. 2d 782 (CA8, 1947). It should be made clear whether, in the context of the bill, a different meaning of the "profit" concept is intended. Moreover, it is not certain whether the bill intends "nonprofit" status to depend only upon the cooperative's electric energy revenues and costs or whether administration of the exemption must also consider cooperative revenues from diversified sources, such as income derived from investments in the securities of other corporations. We understand that some REA cooperatives pay Federal income tax in some years. A cooperative is not subject to Federal income taxation (even though revenues exceed tax deductions), if it collects 85 percent or more of its income from cooperative members. Internal Revenue Code of 1954, section 501(c)(12); 26 U.S.C. 501. Accordingly, payment of Federal income taxes by some cooperatives indicates the importance of resolving the precise meaning to be accorded the term "nonprofit" in the proposed exemption.

2. The qualifying phrase "engaged in rural electrification" may also give rise to uncertainty where a cooperative engages in both urban and rural electrification. A broad construction would reach organizations principally serving urban consumers but incidentally supplying rural power needs. The bill is not confined to cooperatives which are financed by the REA. It also covers both former borrowers in a loan-repaid status and privately financed cooperatives, neither of which are subject to any of the controls which the REA Administrator imposes.

3. In addition to qualifying cooperatives, the bill would exempt "any agency, authority, or instrumentality" of such cooperatives and even "any corporation which is wholly owned directly or indirectly" by such cooperatives.

4. The language may permit investor-owned companies to form qualifying cooperatives, which would, directly or indirectly, construct and own large generation and transmission facilities, and then charge unreasonable or discriminatory rates that would escape Federal regulation. This raises the prospect of a return to the use of special forms of industry organizations as a means of evading regulation, opening up loopholes which the Federal Power Act was carefully drafted to foreclose.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., March 18, 1965.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: By letter dated March 10, 1965, you requested our comments on S. 1459. The purpose of this measure is to further amend the Federal Power Act with respect to the jurisdiction of the Federal Power Commission over nonprofit cooperatives.

This measure would accomplish the same purpose as S. 2028, 88th Congress, which was the subject of our report to you of September 18,

1963, and which was the subject of hearings before the Senate Committee on Commerce during the 88th Congress on July 22 and 23, 1964.

As advised in our report of September 18, 1963, the enactment of this measure would not directly affect the functions of our Office and we have no firsthand information to offer your committee for use in the consideration of this measure.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., April 21, 1965

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: This responds to your request for the views of this Department on S. 457 and S. 1459, identical bills to amend the Federal Power Act, as amended, in respect of the jurisdiction of the Federal Power Commission over nonprofit cooperatives.

The bills would amend section 201(f) of the Federal Power Act, as amended (49 Stat. 847, 16 U.S.C. 824(f)), to include nonprofit cooperatives among the entities exempted from the jurisdiction of the Federal Power Commission in its regulation of electric utility companies engaged in interstate commerce.

We recommend enactment of one of the bills.

Electric cooperatives differ greatly from the typical privately owned utility, which enjoys a monopoly within its service area, and which must be regulated by a public agency in order that the utility not use its monopoly power other than in the public interest. Cooperatives are nonprofit, service organizations owned by the persons who purchase electricity from them. Where there is this identity between the utility and its customers adequate assurance exists that the utility will be operated in the public interest and regulation by the Federal Power Commission is not required.

The Congress has recognized this principle in its exemption from regulation by the Federal Power Commission of organizations serving the function of electric utilities, when operated under the aegis of the United States, a State, or a municipality. In these cases there is an essential identity between the publicly owned utility and the citizens whom it serves. Thus, effective self-regulation in the public interest exists. This, in substance, is the case with nonprofit electric cooperatives and we therefore support these bills.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

STEWART L. UDALL,
Secretary of the Interior.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., April 8, 1965.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1459, a bill to amend the Federal Power Act, as amended, in respect of the jurisdiction of the Federal Power Commissioner over nonprofit cooperatives.

This bill has been examined, but since its subject matter does not directly affect the activities of the Department of Justice we would prefer not to offer any comment concerning it.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law is printed in roman):

FEDERAL POWER ACT

PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

SEC. 201. (a) * * *
(b) * * *
(c) * * *
(d) * * *
(e) * * *

(f) No provision in this part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, *or any cooperative or nonprofit membership organization which is financed by the Rural Electrification Administration,* or any officer, agent, or employee of any of the foregoing, acting as such in the course of his official duty, unless such provision makes specific reference thereto.

○